

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : G : NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.5672/Del/2018  
Assessment Year: 2012-13

Simplex Engineering & Foundry Works Pvt. Ltd., 1503, Hemkunt Tower, 98, Nehru Place, New Delhi 110019. PAN AAABCS4930P	vs.	Deputy Commissioner of Income Tax, Circle 1 & 2, LTU, New Delhi
(Appellant)		(Respondent)

For Assessee :	Shri M P Rastogi, Advocate
Revenue For :	Shri Abhishek Kumar Sr. DR

Date of Hearing :	07.12.2022
Date of Pronouncement :	12.12.2022

**ORDER**

**PER CHANDRA MOHAN GARG, J.M.**

This appeal filed by the assessee is directed against the order dated 31.05.2018 of the Ld. CIT(A), New Delhi, relating to Assessment Year 2012-13.

2. The grounds of appeal raised by the assessee read as under:-

- “1 That there is no error apparent from record as alleged by A.O. with regard to the claim of deduction in respect of exercise duty and service tax claimed by the assessee as deduction permissible under the law and consequently the rectification order as passed by A.O. u/s. 154 of the I.T Act and sustained by CIT(A) is arbitrary, unjust and bad in law.*
- 2. That without prejudice to Ground no. 1 above, the exercise duty and service tax are allowable deduction in the year of their payment u/s. 43B of the IT Act irrespective of the year they relate and consequently the disallowance of deduction of Rs. 35,11,225/- as claimed by the assessee, is arbitrary, unjust and contrary to the provisions of the Act.*
3. The Ld. Counsel of the assessee did not pressed legal ground no. 1 and the same is dismissed has not pressed.
4. Regarding ground no. 2 the Ld. Counsel of the assessee, in the written submissions submitted as under:-

*9. That as per the provision of Section 68 of the Service Tax Act, it is clear that under the Act it is the liability of service provider to pay the service tax - whether being charged or not.*

*9.1 As per Rule 6A of the Service Tax Rules, the service tax shall be paid to the credit of the Central Government by the fifth*

*day of the month immediately following the calendar month in which the service is provided.*

*Therefore, in view of the clear provision of Section 68 read with Rule 6A of the Service Tax Rules, the liability to make payment of service tax is on the service provider, i.e. the assessee, who is providing the service to the Vishakhapatnam Steel Plant and not a liability on Vishakhapatnam Steel Plant. So, the Assessing Officer is incorrect to say that the service tax liability is not of the assessee but of the Vishakhapatnam Steel Plant. It is not the case of the Assessing Officer that the assessee has not paid the service tax to the Government account. The Assessing Officer and the CIT (Appeals) upheld the disallowance merely on the ground that the liability to pay service tax is not of the assessee, but rather it is the client, which is incorrect. However, the fact remains that the service tax has been actually paid by the assessee, which is an allowable deduction u/s 43B of the Act.*

*9.2 Therefore, in view of the above facts and circumstances as well as the law, it is clear that whatever the*

*amount of tax in the form of service tax, differential excise duty and any interest on the delayed payment of service tax, all are admissible deduction under the law and the Assessing Officer cannot disallow the deduction u/s 154 of the Act because there is no apparent and glaring mistake on facts and law. If they want to rectify an order, though not admitted by the assessee, the Assessing Officer has not only to investigate the facts but even the law and the principle of commercial expediency which requires a long drawn process of reasoning which is not permissible u/s 154 of the Act.*

*10. That in the case of Tupperware India (P) Ltd. vs. CIT in 234 Taxman 56 (Del), the Hon'ble Jurisdictional High Court has held that the taxes and duties payable by third person but have been paid by an assessee, in the interest of his business on account of commercial expediency during the course of his carrying out business, is an allowable deduction as a business expenditure.*

*In the case of Tupperware (supra), the said assessee entered into a contract manufacturing agreement with others.*

*The Excise Authorities had created certain demands on contract goods manufactured for the assessee. Under the law, the liability to pay the excise demand was on the contract manufacturers not on the assessee but on the contract manufacturers. However, the assessee paid the same to the Government account and claimed the same as a revenue expenditure on account of commercial expediency because it was in assessee's own interest that all tax liabilities of manufacturers were duly satisfied. On such facts, the Jurisdictional High Court allowed the same as a business expenditure us 37(1) of the Act.*

*10.1 In the instant case, the liability to pay service tax as well as the excise duty is primarily on the assessee under the law though it may be reimbursed by the clients. Under the law, it remains the liability of the assessee - whether reimbursed by the clients or not. Therefore, the excise duty / service tax paid by the assessee cannot be disallowed on the ground that it is not the liability of the assessee.*

5. Replying to the above, Ld. Senior D.R. supporting the orders of the authorities below submitted that the Assessing Officer was right in invoking provisions of section 154 of the Act, by passing order dated 29.03.2017 making addition of Rs. 33,69,900/- which was charged on project bills and Rs. 1,41,325/- of claimed excise duty. The Ld. Senior D.R. further supporting the first appellate order submitted that the A.O was a very well empowered to invoke of provision section 154 of the Act and making the addition in the hands of the assessee.

6. Placing rejoinder to the above submissions the Ld. Counsel of the assessee preciously reiterated the written submissions and submitted that the assessee is a service provider to Vishakhapatnam Steel Plant and liability to pay make payment of service tax is on the shoulders of the assessee provider as per section 68 of Service Tax Act r.w.r.6A of Service Tax Rules. The Ld. Counsel submitted that the Assessing Officer is incorrect to say that service tax liability is not of the assessee but of the Vishakhapatnam Steel Plant. The Ld. Counsel vehemently pointed out that it is not a case of the A.O that the assessee has not paid

the service tax to the Government exchequer but he has made the disallowance on the ground that liability to pay service tax is not of the assessee but of the service receiver which is an incorrect observation. The Ld. Counsel further explain that as per judgment of Hon'ble jurisdictional High Court of Delhi in the case of Tupperware India (P) Ltd. vs. CIT (supra), the taxes and duties payable by third person but have been paid by the assessee, in the interest of his business on account of commercial expediency during the course of his carrying out business, is an allowable deduction as a business expenditure. The Ld. Counsel submitted that in the present case identical facts and circumstances exist as the assessee raised bill on Vishakhapatnam Steel Plant inclusive of service tax but the service receiver Vishakhapatnam Steel Plant did not pay the entire amount of bill including service tax, therefore the assessee debited the same to the P&L account as revenue expenditure on account of commercial expediency similarly the amount of excise duty was also paid by the assessee as the contract manufacturer did not pay partial excise duty to the assessee and assessee after paying to the Government debited in P&L account claiming as revenue expenditure which is also allowable as

business expenditure under commercial expediency u/s. 37(1) of the Act. Finally Ld. Counsel submitted that the liability to pay service tax as well as excise duty was primarily on the assessee under the law though it may be reimburse by the clients but it remains the liability of the assessee whether reimburse by the clients or not. In the present case impugned amounts of service tax and excise duty was paid by the assessee to the exchequer but could not reimburse from the clients due to reasons beyond control of the assessee. Therefore the assessee is entitled to claim it as revenue expenditure under commercial expediency.

7. On a careful consideration of rival submissions from the assessment order we observe that it is not a case of the Assessing Officer that assessee did not pay service tax or excise duty to the exchequer and the A.O has not invoked provisions of section 43B of the Act. The main contention of the Assessing Officer is that the liability to pay excise duty and service tax is not of the assessee but the clients. Neither by the A.O in the assessment order nor by the Ld. CIT(A) in the first appellate order nor by the Ld. Senior D.R. before during argument before us, the factum was not controverted

that the assessee could not recover impugned amounts of service tax and excise duty from its clients but paid the same to the Government and claimed it as business expenditure under commercial expediency to comply with the taxation provisions of the Government. It is not also a case of the A.O that the assessee recovered the amount from Vishakhapatnam Steel Plant and contract manufactures and did not pay the same to the Government or the assessee has wrongly claimed impugned amounts as revenue expenditure because the assessee had already recovered the same from Vishakhapatnam Steel Plant and contract manufacturers. In the situation when the assessee complying with the provisions of indirect taxation and deposit the service tax and excise duty to the exchequer as applicable to the business activity of the assessee. In a situation when the assessee is not able to recover such amounts fully or partially then the assessee is very well entitle to claim the same as revenue expenditure in its P&L account under commercial expediency of complying with the taxation liability as well as maintaining business relations with the respective clients/costumers. Therefore we hold that the A.O was not right in making disallowance in the hands of assessee therefore the ground

no 2 of assessee is allowed and A.O is directed to delete the additions.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 12.12.2022.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Sd/-  
(CHANDRA MOHAN GARG)  
JUDICIAL MEMBER

Dated: 12<sup>th</sup> December, 2022.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi